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IN THE

Supreme Court of the United States

STATE OF ALASKA,
DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

—v.—

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIVE VILLAGE OF KIVALINA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The Native Village of Kivalina is a federally recognized Alaska Native Tribe, providing services to, and protecting the interests of, the Inupiat Eskimo peoples of Kivalina.[1] The Native Village of Kivalina is one of the "Indian tribal entities . . . recognized as having a special relationship with the United States" and thereby is eligible for Bureau of Indian Affairs Services. Indian Tribal Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 47 Fed. Reg. 53,130-31, 53,134 (1982); *see also* 25 U.S.C. §§ 479-479a-1; Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,328, 46,332 (2002). It also has been recognized as an "aboriginal group" for the purposes of eligibility for grants from the U.S. Department of Justice's Law Enforcement Assistance Administration. Determination of Eligible Alaska Native Villages, 45 Fed. Reg. 46,581, 46,582 (1980).

Kivalina is located in northwest Alaska on the coast of the Chukchi Sea, roughly 20 miles northwest of the port for Teck Cominco Alaska Incorporated's ("Teck Cominco") Red Dog mine. U.S. Environmental Protection Agency and Department of the Interior, *Final Environmental Impact Statement, Red Dog Mine Project Northwest Alaska*, EPA-10-AK-Wulik-NPDES-884 (1984) ("*FEIS*"), at IV-51. Nearly all of Kivalina's approximately 380 residents are Inupiat Eskimo. State of Alaska Department of Community and Economic Development,

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae and its members, made a monetary contribution to the preparation of submission of the brief. S. Ct. Rule 37.6. This brief is filed with the consent of the parties; copies of the consents have been filed with the Clerk. S. Ct. Rule 37.3.

Alaska Community Database, *at* http://www.dced. state.ak.us/cbd/commdb/CF_BLOCK.cfm (last visited June 24, 2003); Maniilaq Association, *Kivalina*, *at* http://www.maniilaq.org/kivalina.html. (last visited June 24, 2003).

In proceedings before the Ninth Circuit Court of Appeals, the Native Village of Kivalina filed an amicus curiae letter supporting the position of the respondents United States Environmental Protection Agency ("EPA") *et al.* It continues to support EPA's position, and urges affirmance of the decision of the Ninth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

The Native Village of Kivalina supports the EPA's exercise of authority under the Clean Air Act to prevent the State of Alaska's Department of Environmental Conservation ("ADEC") from permitting Teck Cominco to install a generator at the Red Dog mine that has inadequate pollution control technology. The Native Village of Kivalina supports the actions of the EPA because federal oversight over Alaska's permitting authority is essential to preserving the clean environment upon which Kivalina's villagers depend for their subsistence foods and culture. ADEC's determination that "low" nitrogen oxides ("NOx") is the "best available control technology" ("BACT") for the proposed new generator disregards its environmental responsibilities under the Clean Air Act and will mean that more pollution enters Kivalina's environment.

ARGUMENT

ADEC's approval of low NOx technology allows the company to use a less effective pollution control. The record shows that in reaching its permit determination, ADEC based its decision on some unquantified calculus

of economic benefit to the region and to Teck Cominco and disregarded environmental considerations that are very important to the Native Village of Kivalina.

In northwest Alaska, subsistence hunting, fishing and other food gathering activities comprise most of the local non-cash economy. Kivalina is a traditional Inupiat Eskimo village where subsistence activities, including whaling, provide most food sources. *Id.* From time immemorial, Inupiat Eskimo in the Kivalina area have thrived by hunting caribou, moose, whale, walrus, and seal, by harvesting fish from the Chukchi Sea and local rivers, and by gathering other foodstuffs that grow on the area's tundra, such as the leafy plant sour dock and different kinds of plentiful berries, and these activities provide the source of most of the food in Kivalina. *Id.*; *FEIS*, IV-54-61. Degradation of the natural environment upon which the villagers and their food resources depend will spell the end of the villagers' subsistence culture.

The people of Kivalina live with airborne pollution from the mine. Two years ago the U.S. Department of the Interior's National Park Service announced the results of a study of pollution along the 24-mile length of the mine's haul road located in Cape Krusenstern National Monument. National Park Service, U.S. Department of the Interior, *Heavy Metals in Mosses and Soils on Six Transects Along the Red Dog Mine Haul Road*, NPS/AR/NRTR-2001/38, (May 2001) *available at* http://www.nps.gov/akso/reddog/RedDogrpt.pdf (last visited June 24, 2003). The study found that levels of lead, zinc, cadmium and other metals were well in excess of regulatory standards, with some cadmium levels exceeding "concentrations in samples from heavily polluted regions in Eastern Europe." *Id.* at 21. EPA has listed Red Dog mine for the last eight quarters (July 2001-June 2003) as a High Priority Violator, or HPV, under the Clean Air Act because of violations of the

mine's air quality control permit. U.S. Environmental Protection Agency, *Enforcement & Compliance History Online (ECHO)*, *at* http://www.epa.gov/echo/search_by_permit.html (permit number AK0038652) (last visited June 24, 2003).

If it is not equipped Selective Catalytic Reduction ("SCR") technology, emissions of nitrogen oxides from Teck Cominco's new generator will be substantially higher than if it is equipped with SCR. Theses nitrogen oxide emissions could affect vegetation used by caribou and moose in Cape Krusenstern National Monument and Noatak National Preserve. Thousands of animals from the Western Arctic Caribou Herd graze on the tundra in the vicinity of the mine, and airborne toxins accumulating in the lungs of these animals and coating the vegetation they graze are in turn ingested by the people of Kivalina. Airborne toxins accumulating on berries and other vegetation could be directly consumed by villagers. ADEC ignored these considerations when, as described by the State in its briefing before the Ninth Circuit Court of Appeals, it "gave particular weight to the" fact of "the remote location of the mine and absence of a population likely to be affected by NOx emissions[.]" 9th Cir. Petitioners' Combined Opening Brief, at 10.

Operations of the Red Dog mine also have a very real impact on the quality of Kivalina's water. The Wulik River flows by Kivalina and it is the source of the village's drinking water. State of Alaska Department of Community and Economic Development, *Alaska Community Database*, *at* http://www.dced.state.ak.us/cbd/commdb/CF_BLOCK.cfm (last visited June 24, 2003). The Wulik River also is the village's primary subsistence fishery. *FEIS*, IV-55-61. Kivalina is forced to live with the Red Dog mine's periodic illegal discharges of toxic mining byproducts, including heavy metals and other chemicals, into the upper tributaries of the Wulik River.

In 2001 and 2002 the mine had significant effluent violations of its National Pollution Discharge Elimination System Permit under the Clean Water Act, and EPA lists the Red Dog mine as in "significant non-compliance" with the Act. U.S. EPA, *Enforcement & Compliance History Online (ECHO)*, *at* http://www.epa.gov/echo/ search_by_permit.html (permit number AK0038652) (last visited June 24, 2003).

Economic benefits from the mine have been overstated by the NANA Regional Corporation, Inc. ("NANA"), but especially in comparison to the northwest Alaska Natives' reliance on a subsistence way of life. Brief of Amicus Curiae NANA, at 5. According to information from the Alaska Industrial Development and Export Authority ("AIDEA"), an agency of the State of Alaska, of the 522 permanent, full-time jobs and 59 temporary jobs at the mine in the summer of 2002, just 292 were staffed by NANA shareholders. AIDEA, *Project Fact Sheet: DeLong Mountain Regional Transportation System (DMTS) Road and Port serving mining district that includes the Red Dog Mine* (May 20, 2003), *available at* http://www.aidea.org/PDF%20files/DMTSFactSheet.pdf (last visited June 24, 2003). NANA and Teck Cominco maintain a "fly-in camp" at the mine, which enables non-shareholders to work at the mine and port after commuting from cities where they live and spend their paychecks. Many paychecks from the mine's operation never enter that part of the local economy that is cash-based.

More importantly, the cash benefits from the mine must always be weighed against its environmental costs. To the extent pollution from the mine degrades the environment, the mine depresses the local subsistence-based economy. Use of the most effective pollution control at the mine will help preserve the local environment and will enable the Inupiat Eskimo of Kivalina to survive as subsistence food gatherers long after the mine is played out.

Although NANA emphasizes the economic gap the Red Dog mine would leave if it were forced to close, there is nothing in the record indicating that the mine cannot be operated profitably while using SCR technology on one of its generators. Brief of Amicus Curiae NANA, at 5. In fact, ADEC recently issued a Public Notice of a draft permit that would allow Teck Cominco to install and use SCR on the new generator at the mine. *See* Alaska Department of Environmental Conservation, *Public Notice (Expired)*, *at* http://www.state.ak.us/dec/dawq/aqm/calendar.htm (last visited June 24, 2003).

Moreover, in light of the magnitude of the Red Dog mine and the substantial size of Teck Cominco itself, there was no need for ADEC to be concerned about impacting Teck Cominco's operations. Teck Cominco's annual report for 1999 lists the company's revenues in that year as $1.645 billion, and its operating profits from zinc operations in that year as $234 million. Cominco, *1999 Annual Report*, *available at* http://www.teckcominco.com/investors/reports/clt/clt-99-ar.pdf (last visited June 24, 2003). Although the report does not review how much of Teck Cominco's revenues and profits were attributable to the Red Dog Mine, the report does state that

> [Teck] Cominco's flagship operation, the Red Dog Mine in Alaska, holds approximately 23% of the world's zinc mine reserves. These reserves are the largest and richest ever discovered and play a key role in our strategic efforts to become the world's lowest cost and most profitable zinc producer. More than just a single deposit, Red Dog is proving to be a zinc 'district' that is unrivaled in the world today.

Id. at 2. Teck-Cominco's annual reports lists its revenues as $2.187 billion in 2002 and $2.379 billion in 2001 and the operating profits from its worldwide zinc mining

operations as $50 million in 2002, and $87 million in 2001. *See* Cominco, *2002 Annual Report*, *available at* http://www.teckcominco.com/investors/reports/ar2002/tc-2002-highlights.pdf (last visited June 24, 2003).

The federal oversight provisions of the Clean Air Act, meant to prevent the actions of state and local authorities from weakening national goals for environmental protection, are particularly important to Native American Tribes like the Native Village of Kivalina. This Court recognized long ago that federal government must undertake a trust duty to protect tribal interests because states often do not keep the interest of the tribes at the forefront. *United States v. Kagama*, 118 U.S. 375, 384-85 (1886).

Here the State of Alaska has interests that conflict with an objective view of its responsibilities under the Clean Air Act and with Kivalina's interests. Through AIDEA, Alaska has invested nearly $267 million dollars in the construction of the mine's haul road and port facility. AIDEA, *Project Fact Sheet*, *available at* http://www.aidea.org/PDF%20files/DMTSFactSheet.pdf. As reimbursement, Teck Cominco pays Alaska a toll for the use of these facilities. *Id.* In January 2000, AIDEA underwrote part of a feasibility study by the U.S. Army Corps of Engineers to develop a plan to greatly expand the port, a project that AIDEA also would substantially underwrite. *See* Notice of Intent to Prepare an Environmental Impact Statement for the DeLong Mountain Terminal Navigation Improvements, 65 Fed. Reg. 12976 (2000); AIDEA, *Project Fact Sheet*, *available at* http://www.aidea.org/PDF%20files/DMTSFactSheet.pdf (indicating AIDEA is the local sponsor for this expansion proposal). These financial interests have led ADEC to subjugate the environmental concerns of the Native Village of Kivalina to the economic concerns of Alaska,

NANA, and Teck Cominco, and to shunt aside the BACT requirement of the Clean Air Act.

NANA's supervision of environmental concerns around the mine also has not provided an adequate safeguard for Native Village of Kivalina. Because of NANA's for-profit mandate, it must be concerned foremost with the success of its business partner, Teck Cominco. This perspective has weakened NANA's ability to act as a vigilant watchdog for the environmental concerns of Kivalina.

CONCLUSION

Because Kivalina villagers live in a subsistence-based economy, they depend on the environmental vitality of the land. ADEC's refusal to require adequate pollution controls at the Red Dog mine threatens that vitality. The Native Village of Kivalina therefore supports EPA's exercise of authority under Sections 113(a)(5) and 167 of the Clean Air Act in overseeing Alaska's implementation of the Act's permitting requirements and urges affirmance of the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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